

# Clarifying the divide between delegated and implementing acts?

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# Clarifying the Divide between Delegated and Implementing Acts?

**Case C-427/12, *European Commission v. European Parliament and Council of the European Union*: Judgment of the European Court of Justice, 18 March 2014**

Merijn CHAMON<sup>\*</sup>

*On 18 of March 2014, the Court of Justice delivered its judgment in the European Chemicals Agency (ECHA) fees case,<sup>1</sup> the first case dealing with the problematic distinction, in practice, between delegated acts under Article 290 Treaty on the Functioning of the European Union (TFEU) and implementing acts under Article 291 TFEU. The significance of this case should be searched for in the fundamental changes brought to the hierarchy of norms and the EU's revamped arsenal of acts after the Lisbon Treaty. These changes will first be recalled before presenting the case itself.*

## 1 THE COMITOLOGY RULES POST-LISBON

The overhaul of the comitology system by the Lisbon Treaty made a number of issues more visible that had hitherto remained hidden in the opaque world of implementation pursuant to Article 202, fourth indent, EC. With the introduction of the delegated act under Article 290 Treaty on the Functioning of the European Union (TFEU), the Treaties codified a distinction which had been established by the Court since *Köster*.<sup>2</sup> In that case, the Court reserved the essential elements of the matter requiring regulation to the legislature, allowing the Commission to regulate non-essential elements under its implementation powers of Article 155 EEC (later Article 211 EC). With the introduction of the implementing act under Article 291 TFEU, setting it apart from the delegated act, the Treaties narrowed down the notion of implementation. Under the second comitology decision of 1999 and its amendment in 2006, the regulatory procedure and the regulatory procedure with scrutiny were used to amend or update certain non-essential

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<sup>1</sup> Case C-427/12, *Commission v. Parliament and Council*, ECLI:EU:C:2014:170.

<sup>2</sup> See Case 25/70, *Köster*, [1970] ECR 1161.

provisions of the basic instrument to be 'implemented'.<sup>3</sup> At that time, such legislative (in a material sense) acts thus fell under the broad notion of implementation but, following Lisbon, the acts used to supplement or amend legislative acts are delegated acts rather than implementing acts.

While the Lisbon Treaty thereby somewhat simplified and clarified the field of implementation, it was clear that the simplification and clarification would require further elaboration by the Court of Justice to have the new inter-institutional relations settle in a stable fashion. The case presently under discussion fits in this picture since the Court was asked to clarify the grey area (or even whether there was one) between the implementing and the delegated act.<sup>4</sup> As AG Cruz Villalón noted in his Opinion, this was the first case on this question but undoubtedly not the last.<sup>5</sup> Before dealing with the facts of the case, the two relevant Treaty Articles will briefly be recalled.

As noted above, Article 290 TFEU deals with the delegated acts. That Article provides that it is up to the legislature to determine whether the Commission will be empowered to adopt such acts. The legislature has complete discretion in this, but it may only empower the Commission to supplement or amend the non-essential elements of the legislation at issue. Evidently, the essential elements are reserved to the formal legislature. Even if Article 290 TFEU provides that the Commission's delegated acts are 'non-legislative acts', it is clear that they are legislation in a material sense, since the same Article provides that delegated acts are 'of general application' and that they can alter the scope and content of formal legislative acts. Apart from reserving the essential elements to the (formal) legislature, Article 290 TFEU further lays down that the legislature must define the delegated power as to its objectives, content, scope and duration.<sup>6</sup> The control mechanisms available to the legislature to scrutinize the Commission's exercise of its delegated powers need to be laid down ad hoc in every legislative act delegating

<sup>3</sup> See Art. 2(1) b and Art. 2(2) of Council Decision 1999/468/EC as amended by Council Decision 2006/512/EC.

<sup>4</sup> To be clear, this problem also existed pre-Lisbon. The Lisbon Treaty has taken over the distinction which the Constitutional Treaty would have introduced. Because the ratification process of the latter failed, the Parliament demanded changes to the existing comitology decision, resulting in the regulatory procedure with scrutiny (the delegated act *avant la lettre*) introduced by Decision 2006/512.

<sup>5</sup> Opinion of AG Cruz Villalón in Case C-427/12, *Commission v. Parliament and Council*, ECLI:EU:C:2013:871, para. 3. For a pending case, see Case C-88/14, *Commission v. Parliament and Council*.

<sup>6</sup> This was an important codification of a change in the Court's jurisprudence pre-Lisbon. While the Court had earlier remarked that the legislature 'may delegate to the Commission general implementing power without having to specify the essential components of the delegated power; for that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act' it later ruled that 'when the Community legislature wishes to delegate its power to amend aspects of the legislative act at issue, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria'. See Case C-240/90, *Germany v. Commission*, [1992] ECR I-5383, para. 41; joined cases C-154/04 & C-155/04, *Alliance for Natural Health*, [2005] ECR I-6451, para. 90.

powers to the Commission but Article 290 TFEU itself already hints at the two main (and so far only) mechanisms, while the institutions themselves have also agreed on a Common Understanding on (the use of) delegated acts.<sup>7</sup> As regards the mechanisms in Article 290 TFEU itself, it is firstly provided that the legislature may revoke a delegation in general (obviously without requiring a Commission proposal to change the legislative act) and, secondly, specific delegated acts may be vetoed by (one of the branches of) the legislature.

Article 291 TFEU then codifies the choice for an executive federalism within the EU, confiding the implementation of EU legislation as a rule to the Member States; implementation of EU law by actors at the EU level (rather than the Member States) is the exception. However, whereas pre-Lisbon the legislature had certain discretion whether or not implementation powers should be exercised at the EU level, this question has been objectivised by the Lisbon Treaty. Article 291 (2) TFEU provides that *'[w]here uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or [exceptionally] on the Council.'* Put differently, once it is objectively established that a given legally binding EU act requires uniform conditions for its implementation, the author of that act is left with no choices and is required, under primary law, to entrust the Commission (or the Council) with the implementation of that act.<sup>8</sup> When exercising such implementing powers the Commission is not primarily scrutinized by the EU legislature but by the Member States since they are the actors normally responsible for implementing EU acts. Pursuant to Article 291 (3) TFEU, this control is laid down in the Comitology Regulation which has replaced the (second) Comitology decision.<sup>9</sup> Following the Regulation, any existing references in EU legislation to the old comitology procedures (of the Decision) are to be read as references to the new procedures (of the Regulation). The exception is the regulatory procedure with scrutiny: because of the ad hoc empowerments through delegated acts (cf. *supra*), the references to the old procedure also need to be modified case by case (into references to the delegated act or a new comitology procedure). The Commission had envisaged completing this process by 2014 but the Member States in the Council have shown themselves to be rather

<sup>7</sup> See Council of the European Union, Common Understanding on Delegated Acts, Doc. 8753/11. This Common Understanding does not deal with the demarcation line between Arts 290 and 291 TFEU.

<sup>8</sup> Claude Blumann, 'Le système normatif de l'Union européenne vingt ans après le traité de Maastricht', (2012) *Revue des Affaires Européennes* 2, p. 251; Opinion of AG Cruz Villalón in Case C-427/12, *supra*, ECLI:EU:C:2013:871, para. 50.

<sup>9</sup> Regulation (EU) 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ. 2011 L 55/13.

uncooperative.<sup>10</sup> Indeed, the regulatory procedure with scrutiny allows them much greater control over the Commission than the control allowed under Article 290 or 291 TFEU.

The new system as set-out in the Lisbon Treaty was hotly debated and from the outset it was clear that it left open some questions which would necessarily have to be addressed in political practice and perhaps before the Court. Craig noted five such problems regarding the divide between the realms of Articles 290 and 291 TFEU.<sup>11</sup> The case presently discussed comes under the first of the problems identified, which Craig qualified as ‘a problem of language’. As noted above, the delegated acts foreseen in Article 290 TFEU are to be used when a legislative act is amended or supplemented, i.e., when something is ‘added’ to the legislative act. Article 291 TFEU, on the other hand, foresees situations whereby a binding act is merely implemented. However, even when an act is implemented, rather than supplemented, the implementing authority will also ‘add’ something to that basic act. The difference between implementing (Article 291 TFEU) and supplementing (Article 290 TFEU) is therefore not entirely clear and will depend on the question of whether in ‘adding something’ to the basic legislative act, a ‘new’ but non-essential element is introduced in which case Article 291 TFEU cannot be used. Craig rightly qualified this language issue as a language *problem* not so much because different procedures apply depending on whether Articles 290 and 291 TFEU are invoked but because such an unclear divide calls into question the normative foundation of the fundamental distinction between the delegated and implementing act (which in turn is the ratio underlying the difference in procedures).<sup>12</sup> Still, the implicit premise of Craig’s critique is that the realms of Articles 290 and 291 TFEU are distinct and mutually exclusive, an albeit logical position if one takes account of the fundamentally different purpose of both types of acts.<sup>13</sup> This is an issue which goes to the heart of the problem of distinguishing

<sup>10</sup> See the pending proposals of the European Commission for a number of framework regulations that would align the pre-Lisbon legislation with the new system as set-out in Arts 290 and 291 TFEU: COM (2013) 451 final; COM (2013) 452 final; COM (2013) 751 final.

<sup>11</sup> Paul Craig, *Delegated Acts, Implementing Acts and the New Comitology Regulation*, 36 Eur. L. Rev. 672–677 (2011).

<sup>12</sup> *Ibid.* at 672–674.

<sup>13</sup> See also Thomas Kröll, ‘Delegierte Rechtsetzung und Durchführungsrechtsetzung und das institutionelle Gleichgewicht der Europäischen Union’, (2011) 66 *Zeitschrift für öffentliches Recht* 3, p. 259; Gernot Sydow, ‘Europäische exekutive Rechtsetzung zwischen Kommission, Komitologieausschüssen, Parlament und Rat’, (2012) 67 *Juristenzeitung* 4, p. 159. However, Bianchi earlier noted that ‘[i]l paraît évident qu’il y a superposition entre délégation et exécution’. (own emphasis) See Daniele Bianchi, ‘La comitologie est morte! vive la comitologie! – Premières réflexions sur l’exécution du droit de l’Union après le Traité de Lisbonne – L’exemple de la Politique agricole commune’, (2012) 48 *Revue trimestrielle de droit européen* 1, p. 93. While Ritleng noted: ‘La délimitation des champs respectifs de la législation déléguée et des mesures d’exécution demeurant incertaine, nul doute qu’elle sera source de querelles institutionnelles qui seront, au bout du compte, portées en justice. Il appartiendra alors à la Cour de tracer la frontière.’ See Dominique Ritleng, ‘La délégation du pouvoir législatif de l’union

between the two types of acts and which inevitably also came before the Court in the *ECHA fees* case.

## 2 THE FACTS OF THE CASE

The facts in this case and the question they pose in light of Articles 290 and 291 TFEU are quite clear. Through Regulation 528/2012, the EU legislature has regulated the marketing of biocidal products.<sup>14</sup> The responsibility for implementing this regime is split up between both national authorities and EU authorities, whereby an important role is also foreseen for the European Chemicals Agency (ECHA), the body housing the EU's expertise in chemicals. The procedures before the ECHA need not be discussed here but one element of the regime which should be mentioned is that market operators, in order for some of their products to be authorized, are required to pay a fee to the ECHA to cover the administrative costs resulting from the authorization procedure.

The fact that fees are payable to cover administrative costs made by EU agencies is, by now, a common feature of these bodies' functioning. While EU agencies are often qualified as independent bodies it should be noted that the EU agencies themselves do not decide on the level of the fees payable, unlike for instance a genuine EU *institution* such as the European Central Bank.<sup>15</sup> Instead, the legislature normally leaves it to the Commission to decide on the fees for the EU agencies.<sup>16</sup> Also in the present case the legislature empowered the Commission to decide on the precise fees and this by means of an implementing act. In its original proposal however, the Commission had made the decision on

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européenne', in Cohen-Jonathan, Constantinesco, Michel, Piris & Wachsmann (eds.), *Chemins d'Europe: Mélanges en l'honneur de Jean Paul Jacqué*, Paris, Dalloz, 2010, p. 576.

<sup>14</sup> Regulation (EU) 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products, O.J. 2012 L 167/1.

<sup>15</sup> See for instance Art. 30 of Regulation (EU) 1024/2013 of the Council conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. 2013 L 287/63.

<sup>16</sup> Practice from other agencies is not entirely clear. For instance, the fees payable to the European Securities and Markets Authority under Regulations 648/2012 and 1060/2009 are determined by the Commission through delegated acts (see Art. 72 of Regulation 648/2012 and Art. 19 of Regulation 1060/2009 as amended by Regulation 513/2011). The practice pre-Lisbon is of course different, the REACH Regulation (1907/2006) still refers in its Art. 74(1) to the regulatory procedure of the second Comitology Decision which should now be read as a reference to the examination procedure of the Comitology Regulation. This would suggest that 'implementation' is at issue, but as was noted above, also the regulatory procedure was used to 'adapt or update certain non-essential provisions of a basic instrument' (cf. seventh recital to the second Comitology Decision). The Regulation establishing the EASA (216/2008) today still refers in its Art. 64 to the regulatory procedure with scrutiny to determine the fees payable to the EASA. However, the Commission has proposed to update this in light of the Lisbon Treaty, replacing this with a reference to the delegated act (see Art. 1(43) of proposal COM (2013) 409 final).



the fees subject to the regulatory procedure with scrutiny.<sup>17</sup> Following the entry into force of the Lisbon Treaty, Parliament amended the proposal *i.a.* on this point, putting forward the delegated act to decide on the fees.<sup>18</sup> While the Commission followed Parliament's position,<sup>19</sup> the Council insisted on setting the fees in a Commission implementing act, pursuant to the new examination procedure of the Comitology Regulation. Parliament ultimately accepted this but made it known in a statement annexed to its resolution that it '*accepted implementing acts instead of delegated acts in certain specific cases*' to facilitate an agreement in second reading but that '*those provisions shall not be taken or used as a precedent for regulating similar situations in future legislative acts*'.<sup>20</sup> The final provision on the fees (Article 80 of the Regulation) then determines that the Commission should adopt an implementing regulation setting out: (i) the fees payable, (ii) the rules on fee waivers and reduced fees, and (iii) the conditions of payment and this subject to the principles laid down by the legislature in Article 80(3) of the regulation. These principles *i.a.* require the Commission to set the fees at such a level that the ECHA's costs are covered, that the specific needs of small and medium sized enterprises be taken into account, as appropriate, that the deadlines for payment of the fees be determined taking into account the deadlines for the administrative procedures, etc. The Commission was unhappy about the legislature's choice for an implementing rather than a delegated act and lodged an appeal before the Court of Justice, arguing that Article 80(1) of the biocidal products regulation ought to be annulled.

### 3 ADVOCATE GENERAL CRUZ VILLALÓN'S OPINION

In his analysis, AG Cruz Villalón first starts off with a textual and theoretic analysis of the Articles 290 and 291 TFEU and the new instruments of delegated and implementing acts.<sup>21</sup> Turning to the issue of drawing a demarcation line between the two, the AG is immediately confronted with the fundamentally differing views of the Commission and the Council as regards the respective realms of the two Articles and the difficulty of drawing this line is a recurrent theme in the opinion. Basically, there are two ways to look at the problem. From a theoretic perspective (also based on the text of the Articles) the two realms seem unconnected, since

<sup>17</sup> This is because the Commission's original proposal predated the entry into force of the Lisbon Treaty. See Art. 70(1) of the original proposal in COM (2009) 267 final.

<sup>18</sup> See Art. 71(1) of the proposal as amended by Parliament in first reading, OJ 2012 C 50E/73.

<sup>19</sup> See Commission communication on the action taken on opinions and resolutions adopted by the European Parliament at the September I and II 2010 part sessions, SP (2010) 7193-0.

<sup>20</sup> See Statement of the European Parliament concerning the use of implementing acts, OJ 2013 C 227E/43.

<sup>21</sup> Opinion of AG Cruz Villalón in Case C-427/12, ECLI:EU:C:2013:871, paras 21–54.

amending or supplementing are fundamentally different from implementing. In practice however, and as was also noted by Craig (cf. *supra*), both under supplementation and implementation new elements are ‘added’ to the basic act, meaning that there could be a grey zone when it is not clear whether an addition amounts to supplementation rather than implementation.

The Commission argued from the theoretic perspective, emphasizing the ‘*nature of the power that the legislature wishes to confer*’.<sup>22</sup> Since the nature of implementing is fundamentally different from that of supplementing, the Commission found ‘*the respective areas of the two articles as mutually exclusive*’.<sup>23</sup> The Council on the other hand argued that the extent to which new substantive rules, rights or obligations are laid down should be verified. Evidently this allows the existence of a grey zone, a dark and unclear area where the scales are not balancing in favour of either the implementing act or the delegated act. According to the Council, the more new substantive rules, rights or obligations are added, the faster the scales will fully tilt in favour of the use of the delegated act. While the AG found that it was not necessary to choose sides on this issue to resolve the case,<sup>24</sup> it ineluctably kept popping up.

It first popped up when the question of the possibility and extent of judicial review was raised. Evidently, when the two areas are mutually exclusive, the Court can and should do a full review when scrutinizing the legislature’s choice but if there is a grey zone, the Court might only exercise a limited review.<sup>25</sup> The AG did not directly address this issue but noted that the legislature’s choice should be subject ‘*to a certain degree of review by the Court*’,<sup>26</sup> so that the changes brought by the Treaty of Lisbon (introducing the delegated act) would not be deprived of any actual effect.

Here the AG made the link with that other demarcation line, that between legislative and delegated acts, i.e., between essential and non-essential elements. The AG found that since the Court only exercises limited scrutiny on this issue, the role of the Court should also be limited in scrutinizing the demarcation line between delegated and implementing acts.<sup>27</sup> This would suggest that the AG implicitly subscribed to the grey zone thesis. However, he then continued by remarking that ‘*[the present] frontier is not situated on a continuum in the same way as the*’<sup>28</sup> frontier between legislative and delegated acts. If, because of the absence of a

<sup>22</sup> *Ibid.* at para. 65.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* at para. 68.

<sup>25</sup> *Ibid.* at para. 69.

<sup>26</sup> *Ibid.* at para. 70.

<sup>27</sup> *Ibid.* at para. 71.

<sup>28</sup> *Ibid.*

continuum, there is no link between the delegated and the implementing act, are these areas not mutually exclusive after all?

The AG then gave two workable instruments to decide on the proper demarcation line in a given case. First, he stressed that the distinction should be made following a purposive approach, i.e., was a complete system elaborated in the basic act which only requires implementation or does that system require elaboration?<sup>29</sup> Second, he argued in favour of deciding such cases taking into account the normative context, i.e., not just focusing on the specific enabling clause at issue but also looking at the basic act as a whole.<sup>30</sup> According to the AG, in order to ascertain the objectives under the teleological approach the recitals are ‘*the best means of conveying the legislature’s purpose*’.<sup>31</sup> The AG further also (rightly) rejected recourse to concepts such as ‘political’ or ‘technical’ aspects to draw the demarcation line. He found these concepts unhelpful because ‘the political’ is already largely determined in the basic legislative act.<sup>32</sup> Indeed, without referring on this point to the *Schengen Borders Code* case,<sup>33</sup> it should be noted that the Court in that case emphasized the importance of the ‘political choices’ determining the essential elements, to draw the line between the areas of the legislative and delegated acts.<sup>34</sup>

If the Commission does not exercise a political function when adopting delegating acts, can it nonetheless exercise discretion? The AG rightly makes a distinction between the two, finding that a broad margin of discretion may still be left to the Commission even if it, generally, will not decide on political aspects through delegated acts.<sup>35</sup> The AG continues by noting that ‘*it is necessary to move away from the idea that a law is restricted to what is essential, as has previously been the interpretation of the case-law of the Court of Justice*’.<sup>36</sup> However, here the AG *i.a.* refers to the *Meroni* ruling even if in that case the Court did not rely on the notion of ‘essential elements’ and neither did *Meroni* deal with the delegation of (quasi-)legislative powers.<sup>37</sup> Rather, the idea of essential elements was introduced in the *Köster* jurisprudence governing delegations to the Commission. *Meroni* on the other hand governs delegations to bodies under private law and, as recently

<sup>29</sup> *Ibid.* at para. 73.

<sup>30</sup> *Ibid.* at para. 74.

<sup>31</sup> *Ibid.* at para. 78.

<sup>32</sup> *Ibid.* at para. 75.

<sup>33</sup> Case C-355/10, *Parliament v. Council*, ECLI:EU:C:2012:516.

<sup>34</sup> For a discussion, see Merijn Chamon, *Case C-355/10, European Parliament v. Council of the European Union, Judgment of the Court of Justice (Grand Chamber) of 5 September 2012*, 50 Com. Mkt. L. Rev. 849-860 (2013).

<sup>35</sup> Opinion of AG Cruz Villalón in Case C-427/12, ECLI:EU:C:2013:871, para. 76.

<sup>36</sup> *Ibid.* at para. 77. See however Ritleng’s appeal to the legislature to focus on the essential elements in its legislation, making full use of the delegated act, Dominique Ritleng, in Cohen-Jonathan, Constantinesco, Michel, Piris & Wachsman (eds.), *supra*, at 571.

<sup>37</sup> See Case 9/56, *Meroni & Co. v. High Authority*, [1957-1958] ECR 133.

confirmed in *Short-selling*,<sup>38</sup> to EU agencies. Here the delegate authorities are prohibited from exercising discretionary powers which, even despite the Court's narrow re-interpretation of this notion in *Short-selling*, is broader than the prohibition to modify essential elements of legislation. Still, there is a strand of the Court's case law in which the two lines of jurisprudence seem to be merged, or perhaps confused.<sup>39</sup>

Applying his general and abstract observations to the case at hand, the AG stressed that the legislature in Regulation 528/2012 had relied extensively on the possibility under Article 290 TFEU, finding that it could not be reproached with underutilizing the delegated act.<sup>40</sup> As regards the matter to be regulated, the AG further found that an area such as fees generally belongs to the implementation stage and not the legislative stage,<sup>41</sup> even if legislative practice for other agencies would point to a different conclusion.<sup>42</sup> Turning to the most debated issue between the institutions, i.e., whether the principles set-out in Article 80(3) of the regulation could be 'implemented' or still required the Commission to engage in some policy making to complete the system set-out in Article 80, the AG found that the principles were sufficiently precise.<sup>43</sup> The AG further found the (substantive) legislative process to have been completed on this point, because the principles in Article 80(3) of the regulation did not only apply to the fees for the ECHA but also applied to fees payable to the national authorities. The Member States therefore also had to respect these principles when implementing EU law under Article 291(1) TFEU.<sup>44</sup>

#### 4 THE COURT'S JUDGMENT

While the Court, as per usual, did not really dwell on the general and abstract considerations which adorned the AG's opinion, it did make some observations on the new system introduced by the Lisbon Treaty. The Court noted that pre-Lisbon the notion of implementation had a broader scope, since it is now split up between implementation *sensu stricto* (Article 291 TFEU) and delegation (Article 290 TFEU). In addition, and more important than one would first think, it explicitly

<sup>38</sup> See Case C-270/12, *United Kingdom v. Council and Parliament*, ECLI:EU:C:2014:18.

<sup>39</sup> See Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, [2005] ECR I-6451, para. 90. Recently AG Jääskinen seemed to propose a merger again. See Opinion of AG Jääskinen in Case C-507/13, ECLI:EU:C:2014:2394, para. 62. While the EU agencies (but never private bodies) could indeed be put on an equal footing with the Commission, this would first require a proper anchoring of the EU agencies in the EU's institutional and constitutional law.

<sup>40</sup> Opinion of AG Cruz Villalón in Case C-427/12, ECLI:EU:C:2013:871, para. 85.

<sup>41</sup> *Ibid.* at para. 86.

<sup>42</sup> See *supra* n. 16.

<sup>43</sup> Opinion of AG Cruz Villalón in Case C-427/12, ECLI:EU:C:2013:871, para. 89.

<sup>44</sup> *Ibid.* at para. 96.

coupled the implementing act to the delegated act (and vice versa) by finding that ‘the concept of an implementing act within the meaning of Article 291 TFEU must be assessed in relation to the concept of a delegated act, as derived from Article 290 TFEU’.<sup>45</sup>

Considering both the delegated and the implementing act, the Court noted that the legislature ‘has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290 (1) TFEU or an implementing power pursuant to Article 291 (2) TFEU’,<sup>46</sup> even if the language of Article 291(2) TFEU would appear more restrictive than that of Article 290(1) TFEU (cf. *supra*). As a result, the Court announced that its review would be limited to verifying if the legislature made a manifest error of assessment when it decided that the fees should be determined in an implementing act.<sup>47</sup> The Court further rephrased the question on the demarcation line as follows: whether the legislature has laid down a legal framework governing (*in casu*) the system of fees: (i) to which only further details need to be added, without requiring the amendment or supplementation of the basic act; and (ii) which requires uniform conditions for implementation.<sup>48</sup>

Looking at the provisions *in casu*, the Court noted: (i) that the principles worked out by the legislature indeed amounted to a complete legal framework, which did not require supplementation by the Commission. The Commission’s implementing act containing the details to be added could therefore not amend or supplement the basic act’s non-essential elements.<sup>49</sup> The Court further concluded: (ii) that the legislature could reasonably have found that the system of fees payable to an EU agency (evidently) requires uniform conditions for its proper implementation.<sup>50</sup> Since both conditions under the Court’s test were complied with, it dismissed the Commission’s action as unfounded.

## 5 COMMENTS

During his hearing before the European Parliament the First Vice-President of the Commission noted that clear criteria are needed when making the choice between delegated and implementing acts but that ‘the Court has not been very helpful [and] just says ‘sort yourselves out’ [...] that seems to be the indication the Court has given us’.<sup>51</sup> While this may indeed be the first impression which this ruling gives, the Court’s judgment holds more upon which to comment.

<sup>45</sup> Case C-427/12, ECLI:EU:C:2014:170, para. 35.

<sup>46</sup> *Ibid.* at para. 40.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* at paras 44–51.

<sup>50</sup> *Ibid.* at para. 52.

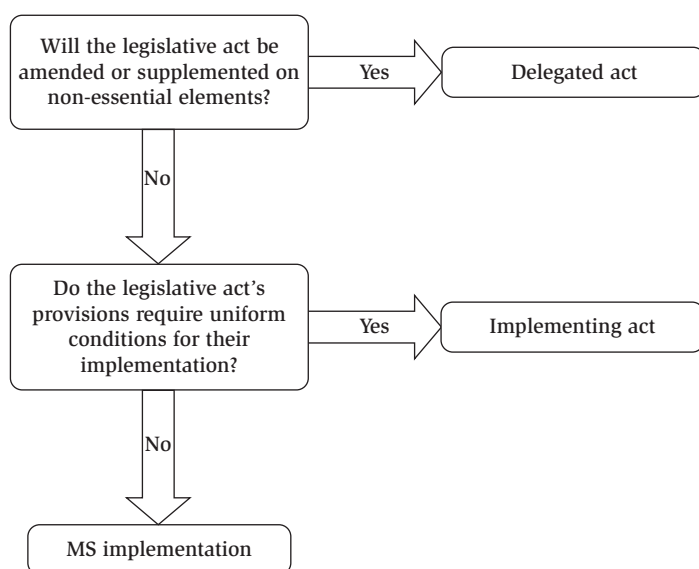
<sup>51</sup> Hearing of First Vice-President designate, Mr Frans Timmermans by the conference of presidents, Brussels, 7 Oct. 2014.

Taking the statement of Mr Timmermans as a starting point, did the Court suggest that the three institutions should 'sort themselves out'? Or was the suggestion that the two branches of the legislature should sort themselves out? In its ruling the Court did not speak in terms of a legislative act empowering the Commission but instead referred to the EU legislature conferring an implementing (or delegated) power to the Commission and whether the EU legislature could reasonably take the view that it had worked out a complete system which only required further implementation, an idea that is also apparent in the AG's opinion.

The judgment therefore strengthens the legislature vis-à-vis the Commission when it comes to the decision whether the basic act should be 'added to' through either a delegated or an implementing act. This is so because the Court made clear that it would only exercise a marginal review as to the reasonableness of this choice and because the Court did not give clear criteria that could instruct the three political institutions in the future. The only limit which could be inferred from the Court's judgment is that it will step in when an enabling clause granting implementing powers to the Commission grants the latter with such a degree of discretion that the Commission would effectively be empowered (or even required) to supplement the basic legislative act.<sup>52</sup> Apart from that, it was this absence of clear criteria which triggered the question posed to Mr Timmermans by MEP Swoboda: since there are no joint criteria subscribed to by the three institutions (cf. *infra*), how would the Commission apply the (basic) criteria foreseen in the Treaties? Mr Timmermans remarked that the distinction between the two types of act looked and still looks logical on paper, but that in practice the Commission's choice for one or the other (in its legislative proposals) will leave either the Parliament or the Council unhappy. However, it should be clear that the Commission itself, just like the Parliament, will also be more inclined to opt for delegated rather than implementing acts. This casts doubt on Mr Timmermans further remarks that in this struggle between Parliament and Council, '*the Commission is in the middle*'. The fact that it was the Commission that brought the case presently discussed already shows that it is not a neutral bystander.

<sup>52</sup> As was noted, cf. *supra* n. 4, the same demarcation problem also existed pre-Lisbon following the introduction of the regulatory procedure with scrutiny. On the demarcation line between that procedure and the other comitology procedures (which now come under Art. 291 TFEU), Jacqu  noted: '*Le meilleur crit re semble  tre celui de la marge d'appr ciation laiss e par l'acte l gislatif   la Commission. Lorsque cette marge est encadr e par des crit res contraignants fix s dans l'acte de base, la nouvelle proc dure [or now a delegated act] ne devrait pas s'appliquer alors qu'il faudrait y avoir recours lorsque la Commission dispose d'une large marge d'appr ciation*'. See Jean Paul Jacqu , 'Introduction: Pouvoir l gislatif et ex cutif dans l'UE', in: Auby & Dutheil de la Roch re (eds), *Droit Administratif Europ en* 47 (Bruylant 2007).

While the Court has indeed not provided (further) criteria,<sup>53</sup> it did give some guidance. This for instance by finding that the function of both acts can only be understood in relation with each other. This was translated in the Court's reworked test: When the legislature wishes to empower the Commission to 'add to' the framework defined in a legislative act, the first question is whether the legislature requires the Commission to amend or supplement the legislative act (on non-essential elements). If this is not the case, the second question is whether the legislative act's specific provisions require uniform conditions for their implementation.



This test requires a 'no' on the first question and a 'yes' on the second question before the Commission may be empowered to adopt implementing acts. If the answer to the first question is 'yes' the legislature must empower the Commission to adopt delegated acts. This might give the impression that the default situation requires the Commission to be empowered to adopt delegating acts but what this case has now made clear is that the legislature is in the driving seat, both when it comes to making the choice between either of the two acts and as regards the elements which the Court will take into account to verify the reasonableness of the legislature's choice. As has been represented graphically, a 'no' on the two

<sup>53</sup> Bianchi has earlier doubted whether any *ex ante* criteria could be devised at all. See Daniele Bianchi, *supra*, (2012) 48 *Revue trimestrielle de droit européen* 1, p. 93. Sydow, on the other hand, emphasized the need for such criteria albeit that he foremost feared the discretion of the Commission rather than that of the legislature in this choice, see Gernot Sydow, *supra*, (2012) 67 *Juristenzeitung* 4, p. 160 & 163.

questions results in the conclusion that the Member States remain responsible and that EU intervention in the implementation stage is not required.

While the test itself might suggest that the implementing and delegated act are connected but mutually exclusive, the Court's actual application of the test confirms the existence of a grey zone. Still, the fact that the Court connects the two acts is remarkable: if something is 'added' to a legislative act without amounting to an amendment or supplementation, the Court finds that it then *must* come under implementation. As the graphic representation shows, conceptually connecting the delegated and implementing act and presenting them as part of a complete system means that there are only three (plus one) possible outcomes: Member State implementation under Article 291(1) TFEU, implementation under Article 291(2) TFEU by Commission or Council and amendment or supplementation by the Commission under Article 290 TFEU. The fourth scenario (not graphically represented) of course is the possibility of adopting a new legislative act (when the legislative act would have to be amended or supplemented on its essential elements). The Court's test then sits uneasily with its judgment in *Short-selling* where it ruled that Articles 290 and 291 TFEU do not form a complete system and that authorities other than the Member States, Commission or Council could be empowered to adopt executive acts different from the implementing and delegated act (or national implementation measures).<sup>54</sup> In the present case, the Court has provided guidance in choosing between the two types of acts provided for under primary law as if the choice is only between these options, all the while ignoring the repercussions of *Short-selling*, where it ruled that the legislature's choice is in fact not confined to the scenarios foreseen in primary law.

Vice-President Timmermans emphasized the need for the Commission to be rational and objective about the criteria it applies and the need for objective criteria to determine whether a delegated or an implementing act is required but this did not really answer the question posed by MEP Swoboda. Indeed, following the *ECHA fees* case, where the Court rejected the criteria advanced by the Commission, there are few incentives for the Council to enter into a (binding) inter-institutional agreement defining joint objective criteria. This is also bad news for Parliament, even if that institution normally also forms part of the EU legislature. After all, the question of MEP Swoboda should also be understood in

<sup>54</sup> For a discussion of this issue, see Merijn Chamon, *The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v. Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism*, 39 Eur. L. Rev. 397–398 (2014); Christoph Ohler, *Rechtsetzungsbefugnisse der Europäischen Wertpapier- und Marktaufsichtsbehörde (ESMA)*, 69 *Juristenzeitung* 5 (2014); Magdalena Skowron, *Kapitalmarktrecht: Rechtmäßigkeit der Eingriffsbefugnisse der ESMA nach Art. 28 Leerverkaufsverordnung*, 25 *Europäische Zeitschrift für Wirtschaftsrecht* 9, p. 353 (2014).



light of Parliament's attempts to come to a new inter-institutional agreement on the use of delegated and implementing acts which would contain a number of non-binding criteria for the institutions.<sup>55</sup> In any event, the criteria proposed by Parliament would have to be updated in the light of the Court's judgment. For instance, in its resolution, Parliament still emphasized, for some criteria, the importance of the discretion left to the Commission, whereby e.g., implementing acts '*should not leave [the Commission] any significant margin of discretion*'. However, the Court in its ruling never referred to such a criterion to draw the dividing line, unlike the Advocate General who relied on it rather heavily.<sup>56</sup>

The *ECHA fees* case leaves the Commission in a rather weak position, even if the Court's judgment is more or less a confirmation of its traditional reticence in all things comitology,<sup>57</sup> as even more recently further illustrated in a case concerning the Commission's use of implementing powers under Article 291 TFEU.<sup>58</sup> The fact that the Court in the *ECHA fees* case did not seek guidance in previous legislative practice as regards fees payable to EU bodies is worth mentioning here, since those precedents would have been supportive of the Commission's argument.<sup>59</sup> If the Commission does not succeed in agreeing with Parliament and Council on some objective criteria, must it then stand idle when in the future the legislature amends its proposals, withdrawing executive law-making powers from the Commission and/or changing references to delegated acts in the proposals into references to implementing acts? At this point one could argue that the 'nuclear option' is always open to the Commission: being master of the legislative proposal it can at any time also withdraw that proposal, preventing the Parliament and Council from adopting a legislative act which goes against the intent or objectives of its original proposal. However, precisely this question is now before the Court in another case related to comitology.<sup>60</sup> Following a political agreement between the Council and Parliament and just before the legislative act would have been signed, the Commission withdrew its proposal for a regulation laying down general provisions for Macro-Financial Assistance to third countries.<sup>61</sup> The Commission did so because the Parliament and Council had agreed to take the individual decisions on assistance pursuant to a

<sup>55</sup> See Resolution of the European Parliament of 25 Feb. 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, P7\_TA(2014)0127.

<sup>56</sup> See for instance Opinion of AG Cruz Villalón in Case C-427/12, ECLI:EU:C:2013:871, para. 88.

<sup>57</sup> Generally, see Carl Frederik Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System*, Oxford, OUP, 2006, p. 319. For a typical pre-Lisbon example see the *LIFE* case, Case C-378/00, *Commission v. Parliament and Council* [2003] ECR I-937.

<sup>58</sup> See Case C-65/13, *Parliament v. Commission*, ECLI:EU:C:2014:2289.

<sup>59</sup> See *supra* n. 16.

<sup>60</sup> See Case C-409/13, Action brought on 18 July 2013 – *Council v. Commission*, OJ 2013 C 274/15.

<sup>61</sup> See COM (2011) 396 final.

legislative procedure, whereas the Commission had proposed to take these decisions through the examination procedure of the comitology regulation.<sup>62</sup> The Council has now challenged the withdrawal decision of the Commission before the Court of Justice, *i.a.* invoking the principle of loyal cooperation and the principle of institutional balance.

## 6 CONCLUSION

The *ECHA fees* case was the first opportunity for the Court to rule on the demarcation line between implementing and delegated acts. In its ruling the Court followed its traditional reserved approach when it comes to comitology affairs, leaving as much flexibility as possible to the political institutions.

The Court thereby confirmed that the EU legislature (Parliament and Council or Council alone, depending on the applicable legislative procedure) has a substantial margin of discretion to decide whether certain additions to a legislative act require the adoption of either a delegated or an implementing act. The Court thus rejected the Commission's argument that the two types of acts should be situated in two mutually exclusive realms.

As part of the flexibility left by the Court to the EU legislature, it has refrained from advancing itself certain criteria guiding the choice between the delegated and the implementing act. However, under the general test advanced by the Court both acts are presented as composing a complete system for executive law-making. After all, if certain non-essential elements need to be added to a legislative act without this amounting to an amendment or supplementation of that legislative act, the Court concludes that implementation is at issue, the only question remaining whether it is implementation under Article 291(1) TFEU or Article 291(2) TFEU. The possibility of empowering a body not foreseen in Article 291 TFEU to adopt an executive act other than an implementing or delegated act, which the Court sanctioned in *Short-selling*, was then not contemplated.

Concisely put, and in view of the remarks of Vice-President Timmermans, the Court instructed Parliament and Council to 'sort themselves out' but the Commission is not a neutral bystander and is not left with many means of leverage in the political negotiations. Even the most unwieldy option, that of withdrawing a legislative proposal when the negotiations are not going the way the Commission wants, is now under scrutiny by the Court, perhaps not coincidentally in an affair related to comitology.

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<sup>62</sup> For some background to this inter-institutional conflict, see Report from the Commission to the Parliament and Council on the implementation of macro-financial assistance to third countries in 2013, COM (2014) 372 final, pp. 4–5.